IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 2169 of 2000

For Approval and Signature:

HON'BLE MR.JUSTICE RAVI R.TRIPATHI

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

PARAG R MISSER VIRAM

Versus

GUJ STATE EXPORT CORP LTD THROUGH MD

Appearance:

1. Special Civil Application No. 2169 of 2000

PARTY IN PERSON for the petitioner

MR PARESH UPADHYAY for Respondent No. 1

CORAM : HON'BLE MR.JUSTICE RAVI R.TRIPATHI

Date of decision: 05/03/2004

ORAL JUDGEMENT

The present petition was on Board yesterday and the Party in Person, a physically challenged person insisted for its hearing as according to him the matter has been lingering before the Court despite the fact that the same was filed on 16.03.2000 and the first order of

notice returnable was passed on 29.03.2000. Thereafter, as usual the matter was adjourned for number of occasions and finally on 01.12.2000 this Court issued rule making it returnable in the first week of February 2001. The Party in Person requested that if the matter could be heard, the hanging uncertainty may come to an end and his agony of coming to this Court frequently may also come to an end. In that view of the matter it was ordered that the matter will be taken up for final hearing today peremptorily. That is how the matter is taken up for final hearing.

2. The Party in Person submitted that he is a physically challenged person suffering from Cerebral Palsy with Spastic Quadriplegia. His partial permanent disability is assessed at 80 to 90% by the Government Hospital, Bhavnagar vide Certificate dated 21.10.1984. A copy of the said certificate is at Annexure 'E' to the petition.

3. The facts of the case are that the petitioner was appointed as Management Trainee by the Gujarat State Export Corporation Limited (hereinafter referred to as the "respondent corporation") by order dated 16.09.1997. The order was to become effective from 01.10.1997. The appointment was on probation for a period of one year, from the actual date of joining of the petitioner. Clause (5) of the appointment order is relevant for the purpose of adjudicating the controversy involved in the petition, which reads as under:

> "5. You will be initially on probation period of one year from the actual date of your joining with us and would continue to be so unless and until you are expressly confirmed in the regular services of the corporation. The probation period can be curtailed or extended by the Management at its sole discretion without assigning reasons. During the probationary period your services are liable to dispensed with at any time, without any notice, compensation or assigning any reasons thereof at the sole discretion of the corporation."

3.1 Clause (5) is a usual clause and more particularly, in the matters where the contracting parties are not at par with each other, a person seeking employment in an institution like the respondent corporation has to agree, to the terms and conditions on which the appointment is offered. The petitioner also agreed to the contents of clause (5) of the appointment

order. Be that as it may the petitioner worked hard and on his completion of probation period, i.e. on 30.09.1998 he was offered the post of Manager Grade 'I' by order dated 13.10.1998, making effective from 01.10.1998. This requires to be mentioned with a purpose and the purpose is that the management found the services of the petitioner indispensable and that is why issued an order on 13.10.1998 making it effective since 01.10.1998. The Party in Person submitted, with all emphasis at his command that the post of Manager Grade 'I' is higher than two other cadres, namely, Deputy Manager and the Joint Manager. It was as a mark of appreciation of his services, which is not required to be spelt out in so many words because the issuance of the order of appointment to the post of Manager Grade 'I' speaks for itself. A copy of the appointment order to the post of Manager Grade 'I' is at Annexure 'D' to this petition. This time the respondent corporation did not think it fit, may be because the Corporation had the performance of the petitioner with it, to incorporate a clause, like clause (5) of the earlier order. Instead of that it was only stated in the order that:

> ".. .. Initially you will be on a probation period of one year. You will be governed by GEC Staff Service Rules, 1968, as may be amended from time to time. Other terms and conditions of appointment will be finalised afterward. .. .. "

4. The petitioner was then allowed to continue for the full term of probation, i.e. upto 30.09.1999 and on that day an order, terminating the services of the petitioner was issued, which brought the petitioner before this Court by filing the present petition.

5. The impugned order dated 30.09.1999 is produced at Annexure 'A'. The order reads as under:

> "You were appointed as Manager Grade-1 on probation for a period of one year w.e.f. 1.10.1998 vide order, letter dated 13.10.1998. During probation period, you services are not found satisfactory. Your services are terminated w.e.f. 30.9.1999 after office hours and you are relieved from the services of the corporation w.e.f. 30.9.1999 after office hours."

6. The Party in Person emphatically submitted that an order of termination cannot be allowed to stand in view of the fact that for a long two years the petitioner

was with the corporation, initially one order was issued, as Management Trainee, on successful completion of that he was appointed as Manager Grade-I, instead of offering the post of either Deputy Manager or Joint Manager. Thereafter, he completed one year service as Manager Grade 'I' with the respondent corporation without there being one single communication, complaining about his unsatisfactory discharge of duties, deficiency on any front in any manner. Therefore, now to terminate his services on the ground that his services are not found satisfactory is nothing but an unjust and arbitrary action and the order is illegal, which required to be quashed and set aside by this Court in light of various decisions of the Honourable the Apex Court and this Court.

7. The Party in Person strenuously submitted that he was never granted an opportunity of hearing before penalty of 'economic death' was imposed on him that too without giving him an opportunity to improve upon. He submitted that the case is required to be viewed in light of the peculiar facts of the case being, the petitioner is physically challenged person, he is allowed to put in two years' service with the respondent corporation and at the end of that period by an order he is sent home branding his services to be 'not satisfactory'.

8. The Party in Person relied upon a decision of the Honourable the Apex Court in the matter of V.P. Ahuja Vs. State of Punjab and others, reported in AIR 2000 SC 1080, wherein the Honourable the Apex Court has held that,

> "A probationer or a temporary servant is also entitled to certain protection and his services cannot be terminated arbitrarily, nor can those services be terminated in a punitive manner without complying with the principles of natural justice."

The Honourable the Apex Court has also held in the same decision that,

> "The termination order founded on the ground that the probationer had failed in the performance of his duties administratively and technically. Ex facie, is stigmatic. such an order which on the face of it is stigmatic could not have been passed without holding a regular enquiry and giving an opportunity of hearing to the probationer. Plea that probationer cannot claim

any right on post as his services could be terminated at any time during the period of probation without any notice, as set out in the appointment letter, cannot be countenanced."

9. The Party in Person next relied upon a decision of the Honourable the Apex Court in the matter of Chandra Prakash Shahi Vs. State of U.P. and others, reported in AIR 2000 SC 1706, where the facts were a constable in U.P. Pradeshik Armed Constabulary, who had completed his training and was placed on probation for two years, on completion of the probationary period, without any blemish found involved in a quarrel with a fellow constable, his services were terminated by a simple notice. The Honourable the Apex Court was pleased to observe that, 'the order is punitive and violative of Regulation 541(2) of U.P. Police Regulations. The Party in Person pointed the observations made by the Honourable the Apex Court in para 24, wherein the Honourable the Apex Court was pleased to refer its earlier decision in the matter of Ravindrakumar Misra Vs. U.P. State Handloom Corporation Ltd., reported in AIR 1987 SC 2408 : 1987 (Suppl.) SCC 739, wherein it is held that,

"Finding out the effect of the order of termination, the concept of "motive" and "foundation" has to be kept in mind. It was further observed that no straitjacket test can be laid down to distinguish the two, namely, the 'motive' and the 'foundation'. Whether motive has become the foundation has to be decided by the Court with reference to the facts of a given case. It was also observed that 'motive' and 'foundation' are certainly two points of one line-ordinarily apart but when they come together, 'motive' gets transformed and merged into 'foundation'. It was also observed that since in regard to a temporary employee or an officiating employee an assessment of the service is necessary, merely because the Authority proceeds to make an assessment and record its views, it would not be available to be uitlised to make the order of termination, following such assessment, punitive in character. It was observed by this Court that in the relationship of master and servant there is a moral obligation to act fairly. There should be an assessment of the work of the employee and if any defect is noted in his working, the employee should be made aware of the defect in his work and deficiency in his performance. Defects or deficiency,

indifference or indiscretion may be with the employee by inadvertence and not by incapacity to work. Timely communication of the assessment of work in such cases may put the employee on the right track. Without any such communication, it was observed, it would be arbitrary to give a movement order to the employee on the ground of unsuitability." (emphasis supplied)

10. The Party in Person next relied upon a decision of the Division Bench of this Court in the matter of Director, Lok Bharti & another Vs. Mukeshbhai C. Tanna & others, reported in 2003 (1) GLR 585, wherein the Division Bench has held that, 'a professor serving in a college, cannot be dismissed or removed from service without a notice and an inquiry, especially when there are allegations of unfitness'. In this case the Division Bench was pleased to reproduce the relevant extracts in para 11, which reads as under:

".. .. The institution has engaged you on probation for a period of two years. .. ..

.. ..
Your working as Professor has not been found to be satisfactory.
.. .."

In these facts and circumstances, this Court was pleased to dismiss the petition and uphold the decision of the Tribunal, whereby the order of termination was quashed and the respondent was ordered to be reinstated in service with consequential benefits.

11. Mr.Paresh Upadhyay, the learned advocate appearing for the respondent corporation emphatically submitted that this is a case of 'terminating the services of the probationer' and as is contained in the appointment order the corporation was always within its rights to terminate the services of the petitioner while he was on probation. In this regard, Mr.Upadhyay, the learned advocate relied upon two decisions of the Honourable the Apex Court in the matters of, (i) Krishnadevaraya Education Trust and another Vs. L.A. Balakrishna, reported in AIR 2001 SC 625, and (ii) H.F. Sangati Vs. R.G. High Court of Karnataka and others, reported in AIR 2001 SC 1148. According to Mr.Paresh Upadhyay, the employer has in-built right and power to terminate the services of a probationer while the employee is on probation. The aforesaid decisions have no application to the facts of the present case. The

facts of the case on hand are similar to the facts of the case cited by the Party in Person. In the considered opinion of this Court, in light of the fact that the petitioner having put in two years of service, more particularly after he completed his one year probation as 'Management Trainee', he was offered the post of Manager, Grade 'I' giving him a jump of two lower posts, namely, Deputy Manager and Joint Manager, there is no reason for this Court to believe that his performance became so poor which will warrant termination. Assuming for the sake of argument that it so happened, then also as laid down by the Honourable the Apex Court in the case of V.P. Ahuja Vs. State of Punjab and others (supra), though the petitioner was a probationer, he ought to have been given an opportunity to improve without which the termination is an arbitrary one. Not only that as the Honourable the Apex Court has rightly observed in the case of Ravindrakumar Misra Vs. U.P. State Handloom Corporation Ltd. (supra) that,

> ".. .. There should be an assessment of the work of the employee and if any defect is noted in his working, the employee should be made aware of the defect in his work and deficiency in his performance. Timely communication of the assessment of work in such cases may put the employee on the right track. Without any such communication, it was observed, it would be arbitrary to give a movement order to the employee on the ground of unsuitability."

12. In view of the aforesaid discussion and in view of the decision of the Division Bench of this Court in the case of Director, Lok Bharti (supra), the present petition deserves to be allowed and the same is accordingly allowed. Order of termination dated 30.09.1999 is hereby quashed and set aside. The respondent corporation is directed to reinstate the petitioner in service forthwith with all consequential benefits. Taking into consideration the special circumstances of the case, namely, the petitioner being a physically challenged person, it is directed that the respondent corporation shall comply with these directions within two weeks from the date of receipt of the same. Rule is made absolute. No order as to costs.

(Ravi R. Tripathi, J.)
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